Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

DOUG ELDER AND MARK CLARK, individually and as representatives of the general membership of Houston Police Officers Association and all Class a Police Officers Holding the Rank of Police Officer and Sergeant of Police,

Petitioners,

v.

CITY OF HOUSTON and DOROTHY A. EDWARDS, AFRO-AMERICAN POLICE OFFICERS LEAGUE, THE HOUSTON POLICE ORGANIZATION FOR SPANISH SPEAKING OFFICERS, LIONEL AARON, BENNIE CONWAY, CLEMENT BOYD CROSBY, JR., JOSE GARCIA, JR., RICHARD C. GARCIA, MARIA L. GUILLORY, ANTHONY R. JAMMER, CHARLES A. MCCLELLAND, SILAS MONTGOMERY, JR., CLYDE PHILPOTT, CARL WAYNE REED, RICHARD M. SPENCER, and BRUCE D. WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Relief provided to minority workers to address past disparate impact must be narrowly tailored and serve a compelling governmental purpose. The question presented here is whether the relief granted by the District Court and affirmed by the Court of Appeals was sufficiently narrow to not harm innocent third parties and to comply with the equal protection provisions of the United States Constitution?

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PETITION FOR A WRIT OF CERTIORARI

Doug Elder and Mark Clark, *et al.*, the Intervenors in the District Court and appellants in the Court of Appeals, petition for a writ of certiorari to review the judgment of the

United States Court of Appeals for the Fifth Circuit in *Dorothy Edwards, et al. v. City of Houston, et al.*, 5th Circuit Docket No. 01-20519 (October 22, 2002)

OPINIONS BELOW

The Court of Appeals opinion is not reported but is reproduced as Appendix A to this petition (hereinafter referred to as Pet. App.).

The District Court's Consent Decree dated March 30, 2001 (filed April 2, 2001) is reproduced as Appendix B. The Court's Findings of Fact on Approval of Consent Decree, dated September 12, 2000, is reproduced as Appendix C. The Court's previous Findings of Fact and Conclusions of Law dated March 25, 1993, adopted in the September 12, 2000, Findings of Fact, is unreported but is reproduced as Appendix D.

STATEMENT OF JURISDICTION

The Court of Appeals judgment was entered on August 19, 2002. On September 3, 2002, a motion for rehearing and motion for rehearing en banc was filed. The Court of Appeals entered an order denying the motion for rehearing and the motion for rehearing en banc on October 22, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000, *et seq.*, as amended by the Civil Rights Act of 1991, and the Equal Protection Clause of the Fourteenth Amendment, United States Constitution.

STATEMENT OF THE CASE

1. This protracted litigation originated with the filing of EEOC charges in 1975 and 1976, alleging that the Houston Police Department discriminated against African-American officers because of their race. Such actions were alleged to violate Title VII of the Civil Rights Act of 1964, as amended. The two cases filed were *Kelley v. Hofheinz,* Civil Action No. H-75-1536 and *Comeaux v. City of Houston*, Civil Action No. 76-H-1754. The two cases were consolidated and referred to as *Kelley*. In 1983, attempts were made to settle the *Kelley* litigation but the settlement discussions were unsuccessful. Almost ten years later, in April 1992, a group of African-American and Hispanic-American officers moved for leave to intervene in *Kelley*. This group alleged that Houston Police Department promotional exams were racially discriminatory. These allegations focused on promotional exams to the ranks of Sergeant and Lieutenant.[1]

2. The City moved to dismiss the *Kelley* case for lack of prosecution. The City also opposed the intervention and suggested that the intervenors should pursue their claims in a new lawsuit limited to the 1991 promotional exams which formed the basis for the underlying EEOC charges.

3. The District Court expressed reservation in allowing claims to reach back to 1975 and the intervenor applicants proposed a compromise to limit claims to those promotional exams given after January 1, 1982. The City would not agree with the compromise.

4. On June 17, 1992, the District Court dismissed the claims in *Kelley* except for the promotional exam related

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1. *See* United States District Court Docket Sheet.

claims after January 1, 1982. The District Court also denied the intervention application and ordered the applicants for intervention to file a new lawsuit. This new lawsuit was then to be transferred to the same Court and consolidated with the remainder of the *Kelley* case creating a new class of Hispanic-American and African-American officers.

5. This new class included Hispanic-American and African-American officers who took promotional exams for the rank of Sergeant from 1982 to present (1992) and those who took such tests in the future. The class also included African-American officers who took a promotional exams for the rank of Lieutenant from 1982 to present (1992). There was no inclusion of Hispanic-American officers who took a lieutenant's exam from 1982 to present (1992) since the City's records did not indicate the exam excluded Hispanic-American officers from promotion to lieutenant. The class also alleged that the discriminatory sergeant's exam delayed their promotion to sergeant and therefore delayed their promotion to lieutenant.[2]

6. During discovery, the City provided promotional exam, support material and identified candidates by race. In the Fall of 1992, settlement discussions began. The case was eventually settled and the Consent Decree, dated February 3, 1993, embodied the settlement and findings of the Court. (Pet. Lodging L-1).

7. The Court provided an opportunity for present and former members of the Houston Police Department to object to the Consent Decree. The Houston Police Officers'

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2. *See Edwards v. City of Houston* case, Civil Action H-92-CV-2510. United States District Court Docket Sheet.

Association (HPOA-later re-incorporated as the Houston Police Officers' Union (HPOU)) sought leave to intervene. The Houston Police Patrolmen's Union (HPPU) also moved to intervene. The Court denied ~~the~~ intervention. The HPOA and the HPPU appealed to the Fifth Circuit.

8. A panel of the Fifth Circuit upheld the District Court's denial of intervention. *Edwards v. City of Houston*, 37 F.3d 1097 (5th Cir. 1994). The case was then heard en banc by the Fifth Circuit. The en banc court concluded intervention should have been granted. *See Edwards v. City of Houston*, 78 F.3d 983 (5th Cir. 1996) (en banc).

9. The District Court, on remand, entered an Interim Order allowing the City of Houston to make remedial promotions and regular promotions on an acting basis. The remedial promotions were strikingly similar to the provisions of the earlier Consent Decree except for the acting status. (Interim Order, Pet. Lodging L-45). On March 5, 1997, the HPOU appealed the Court's Interim Order seeking a stay from the Fifth Circuit. The Fifth Circuit expedited the appeal and dismissed the appeal in May of 1997. The District Court then held a fairness hearing (bench trial) on February 3rd, 4th and 5th, 1999.

10. The District Court entered Findings of Fact on Approval of Consent Decree on September 13, 2000, which included the Court's previous findings of fact and conclusions of law filed in March 1993. (Pet. App. C). The Final Consent Decree was entered by the Court on March 30, 2001 (Pet. App. B). Intervenors filed their respective appeals with the Fifth Circuit. A panel of the Fifth Circuit upheld the District Court's Final Consent Decree in an unpublished per curium decision. (Pet. App. A). Motions for rehearing and

for rehearing en banc were filed. The Fifth Circuit denied these motions on October 22, 2002.[3]

Details of the Final Consent Decree

11. The District Court found there was evidence that the promotional exams for the rank of sergeant from 1982 to 1991 produced a racially disparate impact on African-Americans and Hispanic-Americans and the promotional exam for the rank of lieutenant from the same period had a disparate impact on African-Americans. The District Court also found that this disparate impact resulted in a postponement of promotional opportunities for African-Americans and Hispanic-Americans. As a result of evidence presented, the District Court determined that the 1982 to 1991 promotional tests to lieutenant and sergeant were not job-related or there was substantial doubt as to their job-relatedness.

12. As a result of these findings, the District Court ordered 96 remedial promotions to Sergeant and 10 remedial promotions to Lieutenant accompanied by remedial (back dated) seniority. (Pet. App. B (Final Consent Decree), pp. 13a-14a).

13. These remedial promotees were qualified for promotion based upon test scores from the "non-job-related" promotional exams which had formed the basis for the case in the first place. The criteria for selection of remedial promotees was that they must have passed (with a score of 70) at least one promotional exam between 1982 and 1991. (Pet. App. B (Final Consent Decree), pp. 14a-15a).

14. This petition questions the Final Consent Decree and the decision of the Court of Appeals in upholding the actions

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3. *See* Fifth Circuit General Docket Sheet.

of the District Court. The District Court implemented a plan whereby the City of Houston would create 96 sergeant and 10 lieutenant positions over 5 years to address the harm caused by the City's "defective" tests. These 106 positions were filled by Arican-American and Hispanic-American officers.

REASONS FOR GRANTING THE PETITION

15. The Houston Police Department's promotional process which was in effect during the period of time covered by this litigation consisted of a written test score, with additional points for seniority and efficiency rating grades. This process resulted in a rank-ordered list based upon the sum of these different criteria. Officers were promoted off the list in the order they appeared on the rank-ordered list. Such was not the case with the remedial promotees.

16. Even though there may have been an arguable basis for the finding of disparate impact, the relief implemented forced innocent third parties to shoulder the burden for the Houston Police Department's past discriminatory practices. The race based preference embodied in the Final Consent Decree is subject to strict scrutiny under the Fourteenth Amendment. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Strict scrutiny places the relief under the most arduous judicial review, a "most searching review". *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273-274 (1989).

17. This standard of review is not focused or dependent upon the race of the individuals burdened or benefitted by a particular classification. *Croson*, *supra*, at 494. In the case at bar, innocent third party officers were burdened by the relief granted. The relief, drafted to address past

discriminatory practices, actually burdened innocent third party officers during the five year implementation period. During that period of time, innocent third party officers who took promotional exams for the ranks of sergeant and lieutenant from 1993 to 1997 faced reduced opportunities for promotion even though the stated position of the Houston Police Department was that the remedial promotees would fill "new" and "extra" promotional positions. Additionally, the officers who "died" at the top of promotional eligibility lists from 1982 to 1991 were bypassed in order to promote African-American and Hispanic-American officers, with lower scores, on their respective lists. This "postponement of promotional opportunities", even though limited and potentially a lesser burden that the burden borne by the minority officers, was the same basis the District Court utilized to justify certain promotions in the Final Consent Decree. (Pet. App. B, pp. 9a-10a).

17. The rights provided under the Equal Protection Clause belong to individuals as their "personal rights". *Croson*, *supra*, at 493. Those individual rights were impermissibly trampled by the relief granted by the District Court which caused the same harm to innocent third parties that the District Court was attempting to address. A less burdensome relief, similar to that granted in *United States v. Paradise*, 480 U.S. 149, 180-182 (1987), would have had the effect of diminishing harm to innocent third parties and addressing the harm caused by the Houston Police Department's past discriminatory practices.[4] Such narrowly

4. The District Court in Paradise ordered a one and one promotion process. In other words, one minority promotion and one non-minority promotion. In the Edwards case, the relief would be to promote one identified minority officer and one innocent third party officer.

tailored relief would address the Title VII concerns and remove the burden shifted to the innocent third parties, thus complying with the Equal Protection Clause. This narrowly tailored relief is within the District Court's equitable relief power (42 U.S.C. § 2000e-5g).

CONCLUSION

For the reasons set forth above, Petitioners respectfully request this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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